2-9-1976

Frank Chenault, Jr. v. Commonwealth of Kentucky

Appellee's Brief 1975-SC-1051

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1051

6404

FRANK CHENAULT, JR. APPELLANT

V. APPEAL FROM MADISON CIRCUIT COURT
HON. JAMES S. CHENAULT, JUDGE

COMMONWEALTH OF KENTUCKY APPELLEE

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to Hon. James S. Chenault, Judge, Madison Circuit Court, Richmond, Kentucky 40475; Hon. Charles T. Walters, Commonwealth Attorney, 25th Judicial District, Winchester, Kentucky 40391, and David B. Redwine, 105 South Main Street, Winchester, Kentucky 40391, Counsel for Appellant, this 9th day of February, 1976.

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MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I.

WHETHER OR NOT THE TRIAL COURT ERRED IN PERMITTING LEADING QUESTIONS TO THE VICTIM OF THE OFFENSE?

II.

WHETHER OR NOT THE TRIAL COURT ERRED IN PERMITTING A TAPE RECORDED CONVERSATION OF MR. CHENAULT WITH HIS WIFE TO BE INTRODUCED INTO EVIDENCE?

III.

WHETHER OR NOT THE CLOSING ARGUMENT BY THE COMMONWEALTH CONSTITUTED REVERSIBLE ERROR?

COUNTERSTATEMENT OF THE CASE

On April 8, 1975, the grand jury of the Madison Circuit Court indicted Frank Chenault, Jr. for various sex offenses against a victim, Deborah Bell, a female under twelve (12) years of age. Under Count I, Mr. Chenault was charged with first degree sexual abuse, KRS 510.110, the offense allegedly having been committed on or about February 8, 1975; under Count II he was charged with indecent and immoral practices, KRS 435.110, the same allegedly having been committed on or about December 21, 1974, and under Count III, indecent and immoral practices, KRS 435.110, allegedly committed between June 1, 1974 and December 21, 1974. Transcript of the Record (hereinafter cited as T.R.) p. 1.

The jury trial on these charges required two (2) days, June 9 and June 10, 1975 (see cover sheet to Volume I of the Transcript of the Evidence) and at the conclusion of the trial, the jury was thoroughly instructed under each count of the three count indictment in that the instructions included the elemental breakdown of those crimes with which Mr. Chenault had been charged. These instructions are found in the Transcript of the Evidence (hereinafter cited as T.E.) pp. 203-206 and at T.R. p. 14-18. After deliberation the jury found Mr. Chenault guilty under Instruction No. 2 (covering Count III of the indictment, the indecent and immoral practices count covering that offense committed between June 1, 1974 and December 21, 1974), instruction number 4 (covering Count II of the indictment, the indecent and immoral practices count covering that offense committed on or about December 21, 1974) and

under instruction number 6 (covering Count I of the indictment, the sexual abuse count covering that offense committed on or about February 8, 1975). On its finding of guilt the jury fixed Mr. Chenault's punishment at two (2) years on each count of indecent and immoral practices and three (3) years on the sexual abuse count and recommended leniency if the defendant agreed to psychiatric care. T.E. pp. 228-229 and T. R. p. 20. In accordance with the jury verdict, the trial court in its FINAL JUDGMENT and SENTENCE OF IMPRISONMENT of July 16, 1975 (recorded August 7, 1975) sentenced Mr. Chenault to two (2) years on each count of indecent and immoral practices and three (3) years for sexual abuse, the sentences to run concurrently. T.R. pp. 31-32.

During the trial, the testimony disclosed that the victim, Deborah Bell, was the stepchild of the defendant Frank Chenault in that Mr. Chenault was married to Deborah's mother, Beulah Chenault. Mrs. Chenault was formerly married to Hamilton Bell. (See the cross-examination by Mr. Chenault's defense counsel of Beulah Chenault beginning at T.E. p. 72). Other than the victim's testimony, which will be reviewed momentarily, the Commonwealth's case in chief was from Beulah Chenault and two (2) officers of the Bank of Richmond where Mrs. Chenault was employed. The Commonwealth also called to the stand Tony Bell, Mrs. Chenault's nine (9) year old son also by her former marriage to Hamilton Bell but upon objection by the defense due to Tony's extreme youth, the Commonwealth permitted the child to be excused. T.E. pp. 99-100.

Mrs. Chenault's testimony established that it was she who discovered the crime on February 23, 1975. T.E. pp. 60. Mrs. Chenault

testified that upon returning home that day, and finding Deborah with Deborah's two brothers, asked of the children: "What are you doing?" T.E. pp. 61. With this innocuous question, or better stated the answer or answers to it, Mrs. Chenault learned what had been going on in her absence, generally during her work as an employee of the Bank of Richmond. Mrs. Chenault confronted Mr. Chenault with what she had just learned from the children asking him if he had been bothering Deborah. T.E. pp. 63. Although Mr. Chenault initially denied any wrongdoing, he admitted it a few hours later stating, according to Mrs. Chenault's testimony at T.E. pp. 64: "'I did, but I only used my hand.'" Then later during Mrs. Chenault's testimony she related a conversation she had with the defendant on Friday, February 28 while the defendant was visiting with Debbie in the hospital in Lexington as Debbie was there for a tonsillectomy. This statement appears at T.E. pp. 66-67 and is basically a confession by Mr. Chenault in which he admitted to Mrs. Chenault how the child was used to achieve an ejaculation and the various positions the child would be in when Mr. Chenault did this. Mrs. Chenault also testified as to the attempts on Mr. Chenault's part to have Mrs. Chenault drop the charges. T.E. pp. 68 and 69. The Commonwealth, as a point of clarification, directs this Court's attention to the fact that although not reflected in the record there was apparently an earlier charge of rape against Mr. Chenault prior to the indictment on which this appeal is concerned, the indecent and immoral practices and sexual abuse indictment of April 8, 1975, T.R. p. 1, and it is not altogether clear exactly what charges Mrs. Chenault was referring at this point in her testimony. Later in this counterstatement of the facts a tape recorded conversation will be reviewed and since this re-

cording was made on March 4, 1975, the charges referred to therein were likely the rape charges. Also during cross-examination of Mrs. Chenault, she testified that she is now divorced from Mr. Chenault. T.E. pp. 74.

Deborah Bell testified next and her testimony established the commission of the crimes on the dates alleged in the three count indictment. As for Count I of the indictment, sexual abuse, allegedly committed on or about February 8, 1975, see Deborah's testimony at T.E. pp. 79-85 (and it should be noted that the corroboration that this offense occurred on February 8, 1975 is that Deborah remembered that this offense occurred on the Saturday in February that Mr. Chenault went to the Bank of Richmond - see Deborah's testimony beginning at her answer to direct question 16 and ending with Deborah's answer to direct question 19, T.E. pp. 80-81 - and it was Mrs. Beulah Chenault who testified that the Saturday that Mr. Chenault went to the bank was Saturday, February 8 being the only Saturday in February, 1975 that Mrs. Chenault worked at the bank - see Mrs. Chenault's testimony beginning with her answer to direct question 53 and ending with her answer to direct question 60, T.E. pp. 70-71); as for Count II, indecent and immoral practices committed on or about December 21, 1974, see Deborah's testimony beginning with her answer to direct question 51 through her answer to direct question 70, T.E. pp. 87-88; and as for Count III, indecent and immoral practices committed between June 1, 1974 and December 21, 1974, see Deborah's testimony beginning with her answer to direct question 116, "It was back in the summer" through her answer to direct question 122, T.E. pp. 93-94.

On this appeal, appellant objects to the testimony of Deborah because of alleged leading questions by the Commonwealth. Apparently this trial was an ordeal for the child. The transcript of the evidence reflects that at least one time Deborah broke down in tears, whereupon the defense moved to set aside the swearing of the jury. However, the trial court overruled the motion stating: "Well, I don't know how you can try a child molestation case without the testimony of the child and all of the attendant things, so the motion is overruled, but don't lead any more, Mr. Walker, but the attorneys can go to the stand." See T.E. pp. 82-83. However, this matter of leading will be considered more thoroughly under ARGUMENT I.

After Deborah testified the Commonwealth called to the stand Catherine L. Shoe, custodian of the time records for the Bank of Richmond, and Terry Hukle, Loan Officer and Vice President of the Bank of Richmond. Ms. Shoe's testimony confirmed those dates that Mrs. Chenault worked at the bank, including the one Saturday in February, the 8th, T.E. pp. 102. Mr. Hukle testified as to the renegotiation of a note with Mr. Chenault on February 8. T.E. pp. 106.

At the conclusion of Mr. Hukle's testimony, the Commonwealth closed its case, T.E. pp. 107, and the defense moved for a peremptory instruction to the jury to return a directed verdict of acquittal, T.E. pp. 108-109, but the motion was overruled, T.E. pp. 110.

The case for the defense was primarily the testimony of Mr. Chenault who denied the acts in question. During direct examination, Mr. Chenault also denied any attempt on his part to get Mrs. Chenault to withdraw from the matter. The relevant passage as to this denial begins with Mr. Chenault's answer to direct question 53 through his

answer to direct question 59, T.E. pp. 117-118. The Commonwealth recognizes that the question was put to Mr. Chenault by defense counsel in terms of: "She has stated here that you tried to get her [Mrs. Chenault] to withdraw from this matter," (direct question 54, T.E. pp. 118) but it is the Commonwealth's position, that the import of the cited dialogue is that Mr. Chenault definitely denied any attempt to have Mrs. Chenault drop the charges. And the Commonwealth does point out that at his answer to direct question 60, Mr. Chenault does admit talking to her about the sale of the house.

During cross-examination of Mr. Chenault the Commonwealth asked Mr. Chenault if he had gone to Veteran's Hospital to which Mr. Chenault responded that he never did go there. T.E. pp. 129. The Commonwealth also asked of Mr. Chenault if he had ever sought the assistance of Dr. Hall at Veterans, and Mr. Chenault said that he had never talked to Dr. Hall. T.E. pp. 129.

The case for the defense in chief also consisted of several witnesses who testified that Mr. Chenault's general moral reputation was good.

After the defense had closed, T.E. pp. 135, the defense counsel had Mr. Chenault recalled to the stand and during this testimony Mr. Chenault admitted going to Veteran's Hospital stating that his earlier denial was because he thought the Commonwealth was asking about St. Joseph Hospital. T.E. pp. 136-137. Then when the Commonwealth cross-examined Mr. Chenault again about Veteran's Hospital and Dr. Tom Hall, Mr. Chenault stated that he had been to Veteran's a number of times and did have a consultation (apparently only once) with Dr. Hall. T.E. pp. 138-139. During this passage of testimony, Mr. Chenault indicated that his earlier answers were based upon confusion centering around

the hospital that Debbie was in, T.E. pp. 137 et seq. After Mr. Chenault's testimony, the defense closed again. T.E. pp. 140.

The next phase of the trial was the rebuttal by the Commonwealth. This rebuttal consisted of a tape recording made by Mrs. Chenault on March 4 of a telephone conversation with her husband, Mr. Chenault. The recording was made by use of a cassette tape player which Mrs. Chenault had purchased for her daughter Debbie at Christmas.

Before this cassette recording was permitted before the jury, the trial court conducted an in camera hearing on the manner of the recording. See T.E. pp. 142 - T.E. Vol II. pp. 152. During this in camera hearing Mrs. Chenault said that her husband, each time he called would ask: "Are you taping me?" to which Mrs. Chenault would answer "Yes, I am taping you" and a lot of times Mr. Chenault would just hang up. T.E. pp. 149. However, Mr. Chenault denied any such knowledge of taping. T.E. pp. 150-151. During the in camera hearing the Commonwealth moved that the tape be introduced into evidence in order to rebut Mr. Chenault's unequivocal statement that he had not talked to or bothered Mrs. Chenault after the charges had been pressed after Mr. Chenault moved out of the house on February 24, 1975 T.E. pp. 143. (A review of the record does not seem to reveal a statement by Mr. Chenault as to a date certain but there is testimony by Mr. Chenault that he did not attempt to have Mrs. Chenault drop the charges. See T.E. pp. 117-118). The defense moved to exclude the tape on the basis that the tape was not proper rebuttal of any testimony, that it was in violation of the Federal Communications Act and a violation of the doctrine of privileged communication between husband and wife. The trial court overruled the defense objections, T.E. Vol II pp. 153. The tape was admitted into evidence.

The conversation between Mr. and Mrs. Chenault covered a variety of topics from sale of the home to dropping of charges. The tape is transcribed in the record at T.E. pp. 163-191. At least one portion of the tape could possibly be considered a confession by Mr. Chenault. See at T.E. pp. 163 following Mr. Chenault's statement: "You can drop charges on me."

Although Mrs. Chenault stated in the in camera hearing that each time Mr. Chenault called he would ask "Are you taping me?" to which Mrs. Chenault would answer "Yes, I am taping you." followed by Mr. Chenault hanging up many times, T.E. pp. 149, apparently such dialogue did not occur between Mr. & Mrs. Chenault when this particular tape was made, as such a statement is not included in the transcription or that particular dialogue occurred before Mrs. Chenault got the tape cassette into operation. Nevertheless Mrs. Chenault testified at the in camera hearing that her husband knew he was being taped. The use of this tape as rebuttal evidence is argued as reversible error by the defense.

The closing argument of the Commonwealth has also served as a basis for an argument of reversible error by the appellant. But the nature of this argument and the objection on the appeal will be considered under Argument III.

ARGUMENT I.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE LEADING QUESTIONS TO THE VICTIM OF THIS OFFENSE.

In Blankenship v. Commonwealth, Ky., 20 S.W.2d 774 (1930) the Kentucky Court of Appeals stated (at 775):

> The only evidence admitted over the objection of appellant was some of the testimony of the little girl. During her examination, the commonwealth's attorney directed her attention to certain matters, and asked her what, if anything, defendant would do to his pants. The witness answered that he would "pull her panties down." The defendant objected to the line of examination. It is not questioned that the substance of the testimony was competent, but the argument is made that the questions were leading and unduly specific in directing attention of the witness to particular subjects. It is not necessary to determine whether the particular line of examination constituted a leading of the witness, since it is well settled that the trial court in its discretion may permit leading questions when the witness is a child of tender years and such method of examination is necessary in order to elicit the facts. 40 Cyc. §§2427-2431. The Civil Code defines a leading question as one that suggests to the witness the answer which the examining party desires. Section 595. They are forbidden on direct examination except under special circumstances making it appear that the interests of justice require it. The practice is not regarded as reversible error in any case if the answer of the witness bears the impress of truth and demonstrates that the examiner's words were not put in the mouth of the witness. Wise v. Foote, 81 Ky. 10. Cf. Western Union Telegraph Co. v. Teague, 134 Ky. 501, 121 S.W. 484. When testimony is competent, although elicited by leading questions, its admission will not be deemed an error, unless the forbidden practice was so persistently indulged as to manifest a disregard of the law on the part of counsel and an abuse of discretion on the part of the trial court. Hall & Little v. Commonwealth, 196 Ky. 167, 244 S.W. 425. It is well known that a leading question propounded to a witness may, by creating an inference in his mind, cause him to testify in accordance with the suggestion conveyed by the

> question, making his answer rather an echo to the question than a general recollection of events. Moore on Facts, § 1268; U.S. v. Lee Huen (D.C.) 118 F. 442; The Lansdowne (D.C.) 105 F. 436. But leading questions nevertheless may stimulate genuine recollection. The right to refresh the memory of a witness is widely recognized and generally conceded, and it is no valid objection to a question that it directs attention to a particular matter. Indeed, it is necessary in the orderly conduct of a trial that the attention of the witness be directed to a particular point. The jury observed the conduct of the witness on direct and cross examination, and there is nothing in the record to suggest that the limits of the law were transcended. 40 Cyc. §§ 2422, 2433; People v. Hinrich, 53 Cal. App. 186, 199 P. 1058; State v. Chase, 106 Or. 263, 211 P. 920; Crank v. State, 165 Ark. 417, 264 S.W. 936. The facts which the child's testimony tended to establish had support in the attending circumstances (Moore on Facts, §1276), and we find no merit in the criticism of the court's ruling on the admission of evidence.

In the instant case the child's testimony had support in the attending circumstances, namely the confession made by Mr. Chenault that he did but he only used his hand, T.E. pp. 64 and his other confession to Mrs. Chenault made at the hospital T.E. pp. 66-67. Since they may have believed Deborah's testimony as well it must have had the "impress of truth."

In the instant case, we also know that the victim, Deborah Bell, shed tears at least one time before the jury and that leading questions were asked of her during interrogation. In Meredith v. Commonwealth, Ky., 98 S.W.2d 1049, the Kentucky Court of Appeals stated (1051):

> Many leading questions were asked the prosecuting witness by the attorney for the commonwealth; the defendant's objections were overruled and he excepted. He now asserts this was erroneous. Leading questions are not to be commended, but the permission of them is within the discretion of the trial court, and judgments will not be reversed for this unless the court has abused his discretion and a shocking miscarriage of justice has resulted. Wise v. Foote, 81 Ky. 10; Hall & Little v. Com., 196 Ky. 167, 244 S.W. 425; Blankenship v. Com., 234 Ky. 531, 28 S.W.(2d) 774; Sexton v. Com.,

> 236 Ky. 354, 33 S.W.(2d) 28. The prosecuting witness was practically a child. She was terrified and embarrassed, as is evidenced by her crying while testifying as the record discloses at five places. The questions dealt with immodest and most delicate matters, and under such circumstances leading questions are often permitted. See 70 C.J. pp. 530, 531, etc., §§ 689 and 690.

Furthermore it is the Commonwealth's position that if there has been an error here as to the leading questions, it is not such an error as to affect the appellant's substantial rights. RCr 9.26.

ARGUMENT II.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE TAPE RECORDED CONVERSATION INTO EVIDENCE, THE TAPE HAVING BEEN MADE BY THE WIFE OF THE APPELLANT WHEN APPELLANT TELEPHONED HER.

In Coffee v. Commonwealth, Ky., 256 S.W.2d 379 (1953) the Kentucky Court of Appeals affirmed a conviction for shooting and wounding in sudden heat of passion without malice. The facts in Coffee disclose that Mr. Coffee and his wife were having marital problems. Mrs. Coffee decided to leave her husband and requested a neighbor, the decedent, to ride her and the children to Mrs. Coffee's mother's home. The decedent obliged her but upon arrival at Mrs. Coffee's mother's house the decedent and Mr. Coffee had an altercation. Mr. Coffee shot and killed the decedent, Mr. Stogsdill. The wife testified at the trial. The Kentucky Court of Appeals stated (p. 381):

> Appellant advances somewhat indirectly the argument that his wife's testimony was given under compulsion and was therefore incompetent. There is no evidence in the record to indicate that pressure was in any manner exerted on the wife to compel her to appear as a witness against her husband. On the contrary, she voluntarily came into court and testified freely and at great length. Actually, appellant's contention, if we interpret it correctly, apparently amounts to the claim that, regardless of her wishes, he could on his own motion deny his wife the right to testify against him. We cannot accept this view. It is true that neither the husband nor the wife can be compelled to testify for or against the other, but the refusal so to do is the prerogative of the witness. Hall v. Commonwealth, 309 Ky. 74, 215 S.W.2d 840. In this instance, the wife chose to testify against appellant and for this reason he cannot be heard to say that she was an incompetent witness.

The Commonwealth also moves that the Kentucky Supreme Court consider the rationale of United States v. Allery ___F.2d___(8th Cir.,

December 9, 1975), Heaney, J. dissenting*. In Allery, a case of first impression in the federal courts, the 8th Circuit ruled that the husband and wife marital privilege did not bar a wife's testimony against her husband concerning his alleged sexual misconduct with their twelve year old daughter.

In the alternative, if the Kentucky Supreme Court is not persuaded by the rationale of the Coffee and Allery cases above, the Commonwealth moves this Court to consider the error harmless, RCr 9.24, in view of the evidence provided by Deborah Bell, the victim.

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*This decision is also reported at 18 CrL 2301 (B.N.A. December 31, 1975, section 2).

ARGUMENT III

THE CLOSING ARGUMENT BY THE COMMONWEALTH DID NOT CONSTITUTE REVERSIBLE ERROR, IF ERROR AT ALL.

It is the position of the Commonwealth that the closing argument in this case, in the main, was a good one. The Commonwealth in closing did not refer to social, class or sectional prejudices as condemned in Taulbee v. Commonwealth, Ky., 438 S.W.2d 777 (1969). Nor did the Commonwealth in closing suggest to the jurors that they might become the objects of scorn and contempt if they failed to bring in a certain verdict, a practice condemned by Pennington v. Commonwealth, Ky., 455 S.W.2d 530 (1970). Also see Goff v. Commonwealth, Ky., 44 S.W.2d 306 (1931) wherein the prosecutor told the jurors that if they failed to return a verdict of guilty they "would be in a class with Judas, who betrayed the Savior for thirty pieces of silver, and with Esau who sold his birthright for a mess of pottage." 44 S.W.2d at 308. Nor is the closing in this argument similar to that in Messmear v. Commonwealth, Ky., 472 S.W.2d 682 (1971) where, in an incest case where the defendant had a previous conviction of carnal abuse of his stepdaughter, the prosecutor repeatedly referred to the defendant's "track record." (In the instant case, of course, there is no previous conviction for anything, but Messmear is cited as an example of an inflammatory argument.)

Granted in closing the attorney for the Commonwealth did refer to that section of the tape recording where Mr. Chenault discussed the possibility of pleading guilty (and again as stated earlier this would have been a plea to a rape charge as this taped conversation was made before the indecent and immoral practices and sexual abuse indictment was returned) T.E. pp. 224-225, but immediately preceeding this line

of argument, the attorney for the Commonwealth explained to the jury that the tape was played "to rebut his [Mr. Chenault's] testimony that he had never asked them to drop the charges against him." T.E. pp. 224.

The Commonwealth moves the Kentucky Supreme Court to consider that if there has been an error here on closing, it should be held to be harmless RCr 9.24.

CONCLUSION

Wherefore for the above stated reasons it is the position of the Commonwealth that the judgment of conviction be affirmed and the appeal dismissed.

Respectfully submitted,

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